other prisoners as witnesses, if he so desired."

The appeal is allowed. The conviction is quashed and the sentence set aside. The other accused, Bong Foo, has not appealed, but what I have decided would also apply to him. Therefore in exercise of my powers of revision I quash his conviction and set aside his sentence.

I order a retrial by another magistrate in respect of both.

Appeal allowed. Retrial ordered.

Solicitors: *Joseph & Son.*

JAGATHEESAN v. LINGGI PLANTATIONS LTD.

[O.C.J. (Gill J.) November 25, 1966]

[K.L. — Civil Suit No. 249 of 1963]

Land Laws — Agreement for sale of land — Sale not completed according to agreement — Whether deposit can be recovered — Whether penalty or liquidated damages.

Contracts — Deposit paid on agreement for sale — Agreement for sale not completed on completion date — Time essence of contract — Whether deposit can be recovered — Whether penalty or liquidated damages — Contracts (Malay States) Ordinance, 1950, ss. 65 & 75.

The defendants had agreed to sell certain lands for the sum of $3,775,000 to one AN. Karuthan Chettiar and the sum of $377,500 had been paid "by way of deposit and part payment" in accordance with the agreement. Karuthan Chettiar assigned the agreement to the plaintiff. The sale was to be completed within 90 days from the date of the agreement and time was of the essence of the contract. The plaintiff failed to complete the sale and the defendants gave notice that the agreement was at an end and that the deposit had been forfeited. The plaintiff brought an action to recover the whole or part of the deposit made on the ground that the forfeiture of the deposit was a penalty and therefore void and that the damages suffered by the defendants should be assessed.

Held: (1) where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to complete the sale at the essential time, cannot recover the deposit if it bears a reasonable proportion to the purchase price and there is a stipulation in the contract as regards forfeiture;

(2) the deposit of 10% was reasonable in the case of contracts for the sale of land and therefore the plaintiff in this case was not entitled to its recovery.

Cases referred to:—

(1) *Wallis* v. *Smith* (1882), 21 Ch. D. 243, 258.

(2) *Howe* v. *Smith* (1884), 27 Ch. D. 89.

(3) *Mussen* v. *Van Diemen's Land Co.* [1938] 1 All E.R. 210.

(4) *Stockloser* v. *Johnson* [1954] 1 All E.R. 630.

(5) *Tay Say Geok* v. *H.G. Warren* [1963] M.L.J. 179.

(6) *H.G. Warren* v. *Tay Say Geok & Ors.* [1965] 1 M.L.J. 44.

(7) *Natesa Aiyar* v. *Appavu Padayachi* A.I.R. 1915 Mad. 896.

(8) *Manian Pattar* v. *Madras Railway Company* (1906), I.L.R. 29 Mad. 118.

(9) *S.S. Maniam* v. *State of Perak* [1957] M.L.J. 75.

(10) *In re Dagenham (Thames) Dock Co., Ex parte Hulse* (1873), 8 Ch. D. 1022.

CIVIL SUIT.

Ng Ek Teong (*Abdul Rahim Nor* with him) for the plaintiff.

D. G. Rawson for the respondent.

Cur. Adv. Vult.

Gill J.: This action arises out of an agreement dated the 25th day of May, 1962, whereby the defendants agreed to sell certain lands for a sum of $3,775,000 to AN. Karuthan Chettiar, who, by a Deed of Assignment dated the 17th day of July, 1962, assigned the agreement absolutely to the plaintiff. Prior to the execution of the agreement the defendants had received from the purchaser a sum of $377,500 "by way of deposit and part payment", as stated in clause 1 of the agreement.

Clause 3 of the agreement provided that the purchase shall be completed on or before the expiry of 90 days from the date of the agreement. Clause 5 of the agreement stated as follows:—

> "If due to any act or default of the purchaser the said purchase shall not be completed as herein provided the vendor shall be entitled by notice in writing to the purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect and the sum of $377,500 (dollars three hundred and seventy-seven thousand five hundred) referred to in clause 1 hereof shall be forfeited to the vendor to account of damages for breach of contract."

The plaintiff's solicitors by their letter dated 19th July, 1962 gave notice to the defendants' solicitors of the assignment and enclosed a copy of the deed of assignment for inspection and return. The defendants' solicitors returned the deed of assignment to the plaintiff's solicitors with their letter dated 26th July, 1962 in which they drew attention to the date of completion of the sale. On 27th July, 1962 the plaintiff's solicitors wrote to the defendants' solicitors to ask for an extension of the period of completion by a further period of 90 days. The defendants' solicitors replied by their letter dated 1st August, 1962 to say that their clients were not prepared to consent to any extension of time. On 27th August, 1962 the defendants' solicitors wrote to the plaintiff's solicitors giving notice on behalf of their clients that the agreement was at an end and that the sum of $377,500, being the deposit paid, was forfeited to account of damages for breach of contract. They further stated that their clients reserved to themselves any right of action arising out of the breach of the agreement.

It is common ground that time was of the essence of the contract and that, as the plaintiff had committed a breach of the agreement by

reason of his failure to complete the purchase within the stipulated period, the defendants were perfectly within their right to terminate the agreement. The plaintiff, however, contends that the forfeiture of the deposit of $377,500 was a penalty and therefore void, and he is asking for a judgment accordingly. He is also asking for an assessment of the damages in fact suffered by the defendants and for such relief as this court may deem fit and proper. In effect his action is for the recovery of the whole or a part of the deposit made under the agreement.

In view of the nature of the plaintiff's case, the main question to be decided is whether in all the circumstances of the case he is entitled to any relief from the forfeiture of his deposit. The answer to that question depends upon whether the deposit paid under the agreement is to be regarded as a penalty or liquidated damages.

In *Wallis* v. *Smith* [1] Lord Jessel M.R., in discussing the English rules as to when a sum named in a contract as the amount to be paid in the event of breach is to be regarded as a penalty or liquidated damages, stated that where there is a condition for the forfeiture of a deposit for the breach of various stipulations, even though some of them may be very trivial, or for the payment of a fixed sum of money, the forfeiture will be enforced and not treated as a penalty.

In the case of *Howe* v. *Smith,*[2] in which there was no express agreement that the deposit shall be forfeited, and the question was considered on the footing that time was not of the essence of the contract, it was held that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. Fry L.J. said in that case at page 101:—

> "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

In *Mussen* v. *Van Diemen's Land Co.*[3] it was held that the provision in the contract relating to the sale of certain lands in Tasmania for the retention of all moneys already paid by the plaintiff was not a penalty and that the plaintiff was therefore not entitled to recover them. Farwell J. said in that case (at page 217):—

> "It is no ground for giving relief to a person from the effect of the contract which he himself has made to say that he has, through no fault of the defendant whatsoever, found himself in difficulties, or that it may turn out to be not a good bargain from his point of view. Considerations of that sort are wholly irrelevant. It matters not, so long as nothing has been done which can be said to be the fault of the defendant. The mere fact that the plaintiff finds himself in difficulties is in itself no ground for invoking the assistance of equity."

In *Stockloser* v. *Johnson* [4] (at page 637) Denning L.J. summed up the legal position with regard to deposits made under sale agreements as follows:—

> "It seems to me that the cases show the law to be this. (i) When there is no forfeiture clause, if money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: . . . (ii) But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. . . . Two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly, it must be unconscionable for the seller to retain the money."

In the preceding paragraph of his judgment at the same page his Lordship had this to say:—

> "In the present case, however, the defendant is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause — a forfeiture clause, if you please — permitting him to keep it. It is not the case of a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid."

The cases which I have cited above, except the case of *Wallis* v. *Smith,*[1] were considered in *Tay Say Geok & Ors.* v. *H. G. Warren,*[5] a case which arose in the State of Malacca where the rules of the English law of contract apply. The purchaser in that case had paid a sum of $90,000 which represented approximately 10% of the agreed purchase price under a contract for the sale of certain pieces of land. Clause 3 of the contract recited that this sum was paid by way of deposit and in part payment of the purchase price. The purchase was to be completed and the balance of the purchase price paid on or before a certain date. Clause 8 provided that if the purchaser should fail to complete the purchase in accordance with the agreement, the deposit of $90,000 would be considered as liquidated damages and forfeited to the vendors. The

purchaser was unable to complete the purchase within the stipulated period and brought an action for the return of the deposit of $90,000. It was held by the Court of Appeal that he was not entitled to the return of the money. On appeal to the Privy Council it was held that as on the facts the purchaser had repudiated the contract the vendor was entitled to accept the repudiation and claim the forfeiture of the deposit (see *H. G. Warren* v. *Tay Say Geok & Ors.*[6]).

I have endeavoured thus far to set out the position under the English law, which is, that an action for the return of a deposit made under a contract of sale is essentially a claim at common law, that at common law a plaintiff has no right to the return of the deposit but that equity may relieve him from forfeiture of the whole or a part of his deposit if the sum forfeited is out of all proportion to the damage or if it would be unconscionable for the seller to retain the money.

The question which I have to consider next is whether the plaintiff can establish that the provisions of the Contracts (Malay States) Ordinance, 1950 give him a right to recover the deposit. This question was considered in relation to the Indian Contract Act, on which our Contracts Ordinance is based, in the case of *Natesa Aiyar* v. *Appavu Padayachi,*[7] in which White C.J. had this to say at page 897:—

> "I agree that the question must be determined with reference to the provisions of the Contract Act and that if they are in conflict with the English law as laid down in the English authorities, we must follow the statute.
>
> I think, however, it may safely be promised ('promised' is obviously a misprint and should read 'premised') that in a question such as this, it was not the intention of the Legislature to depart from what was understood to be the English law at the time the Indian Contract Act was passed. It is also to be observed, as Wallis J. points out, that though several cases as to the right to recover deposits have been decided in India since the Contract Act was passed, in none of these has it been suggested that under the provisions of that enactment the law of India differed from that of England with reference to this question."

The plaintiff's chief contention in the present case is that the defendants are entitled to retain the deposit only to the extent to which they have suffered damages in consequence of the plaintiff's breach of agreement. For this contention he relies on section 75 of the Contracts Ordinance which is the same as section 74 of the Indian Contract Act, and reads as follows:—

> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

It was also contended on behalf of the plaintiff, although this contention was not seriously pursued, that the deposit made is caught under section 65 of the Contracts Ordinance (section 64 of the Indian Contract Act) which reads as follows:—

> "When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

As regards these contentions, it has been held in the Indian Courts again and again that sections 64 and 74 of the Indian Contract Act (sections 65 and 75 respectively of our Ordinance) do not apply to such deposits.

In the case of *Manian Pattar* v. *The Madras Railway Company* [8] the appellant had contracted to supply fuel to the respondent company subject to various stipulations contained in the contract and had deposited a sum of money to be forfeited if he failed to make delivery in accordance with the terms of the contract. He failed to supply in accordance with the terms of the contract and it was held that he was not entitled to recover his deposit. The material passage of the judgment reads as follows:—

> "Neither section 74 of the Indian Contract Act nor the expositions of law in decisions English or Indian which were referred to in the argument, as to promises to pay specified sums in case of breach of contract are really in point, for the rule as to penalties dealt with in them has been uniformly held not to be applicable to cases of forfeiture of deposits for the breach of stipulations even where some of them are but trifling while others are not such (*Wallis* v. *Smith* [1]). In these cases the bargain of the parties is carried out except when the forfeiture is relieved against on terms which the court imposes to meet the justice of the case where the circumstances warrant the grant of such equitable relief. In other words the rule governing the class of cases under consideration is that, where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable, in amount."

In the case of *Natesa Aiyar* v. *Appavu Padayachi* [7] it was held that the deposit made by the purchaser on the contract for the sale of land was not a benefit received under the contract within the meaning of section 64 of the Indian Contract Act; it was a security that the purchaser would fulfil his contract and was ancillary to the contract for the sale of the land. Miller J. said in that case at page 901:—

> "It is as a forfeited security for the performance of the contract and not as part payment of the price that the defendant seeks to retain the deposit, and it will not be denied that a benefit which he has obtained by reason of a breach of contract is not a benefit 'under' the contract."

The case of *Manian Pattar* v. *The Madras Railway Company*[8] was followed in the local case of *S. S. Maniam* v. *The State of Perak.*[9] That was a case in which the plaintiff entered into an agreement in writing with the Government of the State of Perak in connection with the running of the Government Rice Mills at Bagan

Serai, Parit Buntar and Teluk Anson, and in accordance with clause 12(a) of the agreement deposited $5,000 with the Government "as security for the peaceful and good performance of the said work, duties and things."

Clause 12(b) of the agreement provided that upon the breach, non-observance or non-performance by the contractor of the provisions of the agreement, the agreement "shall absolutely cease and determine and the deposit of $5,000 (dollars five thousand) shall be forfeited to and shall be retained by the Government as liquidated damages." On the failure of the plaintiff to fulfil the agreement the Government terminated the agreement and retained the deposit of $5,000, treating it as forfeited in terms of clause 12 of the agreement. The plaintiff thereupon brought an action claiming the return of the deposit, and damages for wrongful termination of the contract. The action was dismissed. Thomson J. (as he then was) said in that case:—

"Having come to the conclusion that it is the plaintiff and not the defendant who was in breach of the contract and that the defendant was entitled to treat the contract as at an end the only question to be decided on the claim is whether or not the plaintiff is entitled to recover the $5,000 which he deposited under clause 12 of the agreement. In that connection, I have listened to a great deal of argument as to whether that $5,000 is to be regarded as a penalty or as liquidated damages.

In my opinion all that argument is entirely beside the point and has nothing whatever to do with the case. I say so for two reasons.

In the first place, in this country there is no difference between penalty and liquidated damages . . . . In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty.

In the second place, however, this is not a case where the party who is not in breach is suing for the amount named in the contract. It is a case where the party who is in breach is suing for the return of a deposit which he has made by way of security for the proper performance of the contract.

The only question then that I have to consider in the present case is whether the amount of the deposit forfeited is reasonable. I am satisfied that it is."

That brings me to the last question which I have to consider in the present case, namely, whether the amount of the deposit forfeited is reasonable. In this connection in *Natesa Aiyar* v. *Appavu Padayachi* [7] Miller J. at page 900 stated as follows:—

"There may be cases where the courts must find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance but rather as a punishment for non-performance of the contract, and in those cases the court may doubtless refuse to allow the retention of the whole of the deposit; but where there is no such disproportion and nothing unreasonable in regarding the deposit as a security, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default."

White C.J. in the same case and at the same page had this to say:—

"If the question of reasonableness is a matter which can be taken into account, I am certainly prepared to hold that a 10 per cent deposit, as in the case on the purchased price (I do not overlook the fact that Rs. 20,000 was to remain on mortgage) is reasonable. In the case of *In re Dagenham (Thames) Dock Co. Ex parte Hulse*, [10] where it was held the vendor could not retain the deposit the deposit was half the purchase money. There as Wallis J. points out, the amount was so large as to take it out of the ordinary class of deposits. There is certainly nothing extraordinary in a 10 per cent deposit under an agreement for the sale of land."

Speaking of the deposit forfeited in the case of *Tay Say Geok & Ors.* v. *H. G. Warren*, [5] Thomson C.J. (as he then was) stated at page 187 as follows:—

"In all that I can find nothing to support the purchaser in the present case. The amount involved is not disproportionate. It is 10% of the purchase price which is the usual amount of the deposit in a contract for the sale of land. The purchaser knew he would lose it if he did not complete. There is no suggestion of any imposition or sharp practice or anything of the sort. In view of the purchaser's conduct it is difficult to see any ground on which it can be said that the vendor's action in retaining the money is unconscionable."

Thus, it is abundantly clear from the authorities that where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to be ready with the purchase money at the essential time, cannot recover the deposit if it bears a reasonable proportion to the purchase price and there is a stipulation in the contract as regards forfeiture. It is immaterial whether the operative words as regards forfeiture are that the deposit "shall be retained by the vendor as liquidated damages" or that it "shall be considered as liquidated damages" or that it "shall be forfeited to the vendor to account of damages for breach of contract."

It therefore follows that the plaintiff in the present case is not entitled to any of the reliefs asked for. In an action by him it is not open to him to ask the court to assess the damages in fact suffered by the defendants, nor is he entitled to recover from the defendants any part of the deposit made under the contract. It is true that the amount forfeited is enormous, but the enormity of the deposit is immaterial so long as it is not disproportionate to the amount of the purchase price. The deposit in fact was 10% of the purchase price, which the courts have again and again approved as being reasonable in the case of contracts for the sale of land.

The action is dismissed with costs.

Action dismissed.

Solicitors: *Braddell & Ramani; Shearn Delamore & Co.*